Keith D. Nowak
Andriy R. Pazuniak
CARTER LEDYARD & MILBURN LLP
2 Wall Street
New York, New York 10005
(212) 732-3200
nowak@clm.com
pazuniak@clm.com

Alex Gertsburg
The Gertsburg Law Firm
36 South Franklin St.
Chagrin Falls, OH 44022
(440) 571-7775
ag@gertsburglaw.com

George Pazuniak
O'Kelly Ernst & Bielli, LLC
901 N. Market St.
Suite 1000
Wilmington, DE 19801
(302) 478-4230
GP@del-iplaw.com

Attorneys for Defendants Broadvox Holding Company, LLC and Cypress Communications Operating Company, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RATES TECHNOLOGY INC., **Plaintiff,** **-against-** **BROADVOX HOLDING COMPANY, LLC, CYPRESS COMMUNICATIONS OPERATING COMPANY, LLC and ABC COMPANIES, 1 TO 10,** **Defendants.**	**Case No. 1:13-cv-00152 (LTS) (SN)**

CLAIM TERMS CHART
AND
MOTION TO ENTER THE CLAIM CONSTRUCTIONS AS ORDER OF THE COURT OR IN THE ALTERNATIVE TO SET A DATE FOR A MARKMAN HEARING

Background and Description of Charts

Pursuant to Pre-Trial Scheduling Order No. 1 and Local Patent Rule 11, Defendants Broadvox Holding Company, LLC ("Broadvox"), and Cypress Communications Operating

Company, LLC ("Cypress") (collectively, "Defendants") hereby their Claim Terms Chart, which lists the disputed claim terms and phrases and Defendants' proposed construction. Pursuant to Patent Rule 11, the Claim Terms Chart also cross-references Plaintiff's infringement contentions, by citing the section numbers that appear in red color in Exhibit A. Exhibit A is a copy of Plaintiff's infringement contentions with the limitations included in the Claim Terms Chart being numbered in red.

Plaintiff has asserted only Claim 1 of Patent 5,425,085 and Claim 1 of Patent 5,519,769. Therefore, only the limitations of those two claims are here considered.

Request to Enter Constructions or in the Alternative to Set a Markman Hearing Date

Paragraph 4 of Pre-Trial Scheduling Order No. 1 states:

> The Joint Claim Terms Chart pursuant to LPR 11 must be filed within 30 after service of Defendant's LPR 7 disclosure. If the parties believe that a Markman hearing will be required, the Joint Claims Term Chart must be accompanied by a request that the Court schedule a Markman hearing and an estimate of the amount of time that should be allocated for such a hearing. Courtesy copies of the filings pursuant to LPR 6, 7, 11, and 12 must be provided for Chambers at the time of filing.

Although the Court Order required the parties to submit the Claim Terms Chart jointly, Plaintiff Rates Technology Inc. ("RTI") has expressly refused to make any submission as part of the Claim Terms Chart, even though Plaintiff knew that today was the deadline for filing the Claim Terms Chart. Therefore, Defendants are filing unilaterally to avoid being in contempt of the Court's Order the Court's Order, which has not been stayed or suspended, and which specifically required the parties to submit their claim constructions on this day.

Moreover, by failing to submit any position on the proper construction of the claims as required by the Court's Order, Plaintiff RTI has conceded the correctness of Defendants' constructions, and has waived any right to submit any further submissions on the subject.

Therefore, the attached claim constructions are undisputed and should be entered as the Order of the Court.

In the alternative, in accordance with Paragraph 4 of Pre-Trial Scheduling Order No. 1, Defendants request a *Markman* hearing at the Court's earliest convenience. Defendants believe that the hearing should take no longer than two hours, even if Plaintiff RTI attempts to propose alternative constructions. Defendants do not believe that more time is required, because

- there are only two claims in issue,
- several of the claim terms have already been judicially construed in a prior proceeding,
- most of the remaining claims are written in means-plus-function language, and, thus, the patent statute, 35 U.S.C. § 112(f), dictates that the proper construction is controlled by the specifications, and
- Plaintiff's admissions during the re-examinations of the patents render most of the claim terms undisputed.

The claims should be construed promptly to bring an early end to this case. Once the claims are construed, it should be apparent that there is no possibility of infringement. Plaintiff must prove that Defendants practice each and every element of each of the two claims in suit, and a construction of any one of the many claim terms in each of the claims will preclude a finding of infringement. And, because there are a number of such dispositive terms, the claim constructions should terminate the case. There should be no reason that the Court and Defendants should be subjected to a lengthy litigation process when there can no infringement when the claims are properly construed.

Therefore, Defendants respectfully request that the Court enter an order providing for the constructions proposed by Defendants below, or set a *Markman* hearing at the earliest possible time. Defendants stand ready to submit the prior judicial constructions of the terms of the two claims, and the record supporting each of the claim constructions below.

CLAIM CONSTRUCTIONS

Patent 5,425,085 Claim 1 Term	Plaintiff's Infringement Contention	Plaintiff's Position	Defendants' Construction
device	Exhibit A at 1	No Construction	An identifiable component that contains all the structures or sub-components identified in the limitations of the remainder of Claim 1.
a housing forming an enclosure and comprising	Exhibit A at 2	No Construction	A physical structure surrounding the operating structures or sub-components identified in the limitations of the remainder of Claim 1. (Col 3 lines 20-39)
first jack means for connection to said first telephone	Exhibit A at 3	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The structure of the "first jack means" is the same structure as shown as item 25 in Figure 7.
second jack means for connection to said network	Exhibit A at 3	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The structure of the "second jack means" is the structure shown as item 25 in Figure 7.

switch means operatively connected to said first jack means for disconnecting (as defined below) said first telephone from said network during routing of a telephone call from said first telephone,	Exhibit A at 4	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The structure of the "switch means" is the "2 Form C switch," which must disconnect the calling telephone from the network during routing to prevent the dialed number from being sent to the central office as it is dialed and during the time when the calling telephone is disconnected from the network, substitute current must be supplied to the calling telephone through the switch means to power the calling telephone. It is referenced in the Patent as item 36, and is described at Col. 3 lines 51-64, and Fig. 2.
disconnecting	Exhibit A at 4	No Construction	Interruption of the electrical circuit between the telephone and the network -- the breaking or opening -- of the electrical circuit between the telephone jack and the network.
means operatively connected to said switch means for generating a current (as defined below) through said switch means to the first telephone corresponding to a current provided by said network, when the first telephone is disconnected from said network by said switch means,	Exhibit A at 5	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The structure of the "means" is the structure shown in the Figure 2 drawing as connecting items 36 and 38, as well as the structure of items 36 and 38 themselves.

means for generating a current	Exhibit A at 5	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The structure of the "means for generating a current" is an intermediate element that conditions or regulates electrical power from a more distant source so that it corresponds to the current that would otherwise have been provided directly by the telephone network, and passes the current through the switch to power the telephone.
means operatively connected to said switch means for detecting and storing said telephone number originating from the first telephone,	Exhibit A at 6	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The structure of the "means operatively connected to said switch means for detecting and storing said telephone number originating from the first telephone" is the combination of: "the DTMF tone detector 88" for detecting a telephone number, and an unknown and indefinite structure for "storing said telephone number originating from the first telephone."
means for addressing said database means for identifying a plurality of communication switch paths to said second telephone and the cost rate of each path,	Exhibit A at 7	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The structure of the "means for addressing said database means for identifying a plurality of communication switch paths to said second telephone and the cost rate of each path" is the algorithm at Col 6 lines 7-47 and Figure 5 of the Patent.
means actuated subsequent to the detection of said telephone number originating from said first telephone for comparing the cost rate of each path so as to determine a least cost route,	Exhibit A at 8	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The element "means actuated subsequent to the detection of said telephone number originating from said first telephone for comparing the cost rate of each path so as to determine a least cost route" is not described in the specification and, therefore, this claim term is indefinite.

means operatively connected to said switch means and said second jack means for generating a number sequence corresponding to a desired carrier so that said call is routed through said second jack means to the selected communication path and carder to establish a switched connection between said first telephone and said second telephone phone.	Exhibit A at 9	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). The "means operatively connected to said switch means and said second jack means for generating a number sequence corresponding to a desired carrier so that said call is routed through said second jack means to the selected communication path and carrier to establish a switched connection between said first telephone and said second telephone phone" is device 10 including all the elements reflected in Figure 7:

Patent 5,519,769 Claim 1	**Plaintiff's Infringement Contention**	**Plaintiff's Position**	**Defendants' Construction**
at a predetermined time and date	Exhibit A at 11	No Construction	The time and date for calling the rate provider are selected a substantial period in advance of the call.
a data transfer line	Exhibit A at 11, 12	No Construction	A wire operatively connected to a modem associated with a call rating device on one end and a phone network on the other.
call rating device,	Exhibit A at 10, 11, 12	No Construction	This is a means-plus-function element, whose construction is governed by 35 U.S.C. § 112(f). But, whether or not a means-plus-function element, the term means an identifiable physical component having the function of receiving rate information from a rate provider over a data transfer line, incorporating the rate information and thereafter managing calls over the least cost routing route.
transmitting over the data transfer line	Exhibit A at 12	No Construction	Conveying information over the same wire operatively connected to a call rating device on one end and a phone network on the other.
indicia identifying the call rating device and the date and time of the last update of the billing rate parameters	Exhibit A at 12	No Construction	The call rating device transmits to the rate provider the time and date of the last update of its billing rate parameters along with its identification information.

verifying if billing rate parameters should be updated	Exhibit A at 13	No Construction	The rate provider, based on the information received from the call rating device, verifies if the billing rate parameters of the call rating device should be updated. If the rate provider determines that an update is required, same is transmitted to the call rating device.
transmitting from the rate provider to the call rating device	Exhibit A at 14	No Construction	The rate provider, based on the information received from the call rating device, transmits the billing rate parameters to the call rating device.

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Respectfully submitted,

Keith D. Nowak
Andriy R. Pazuniak
2 Wall Street
New York, New York 10005
(212) 732-3200
nowak@clm.com
pazuniak@clm.com

Alex Gertsburg
The Gertsburg Law Firm
36 South Franklin St.
Chagrin Falls, OH 44022
(440) 571-7775
ag@gertsburglaw.com

/s/ George Pazuniak
George Pazuniak
O'Kelly Ernst & Bielli, LLC
901 N. Market St.
Suite 1000
Wilmington, DE 19801
Tel: 302-478-4230
Fax: 302-295-2873
GP@del-iplaw.com

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